No. 98-3-01099

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1999

STEVEN CREA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals for the Second Circuit holding that the conditions of supervised release may be amended by the written judgment to include the "Standard Conditions" after sentence has been imposed and in the absence of the defendant affirms a sentencing practice in the Eastern District of New York which is contrary to the will of Congress and violative of the Fifth and Sixth Amendments of the Constitution.

2. Whether the discretionary "Standard Conditions of Supervised Release" can be rendered mandatory by judicial construction of the statute.

PARTIES TO THE PROCEEDING

There were no other parties to the proceedings before the District Court or the Court of Appeals.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

NO. 98-3-01099

STEVEN CREA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Steven Crea, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York denying Petitioner's Motion to Resettle the Judgment and Commitment Order.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *United States v. Truscello, et. al.*, 168 F.3d 61 (2d Cir. January 22,1999) (App. A). The summary order of the United States Court of Appeals for the Second Circuit denying Petitioner's request for a hearing en banc is not published (App. C). The opinion of the District Court is reported at *United States v. Crea*, 968 F. Supp. 826 (E.D.N.Y., June 26, 1997) (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") denying Petitioner's petition for a panel rehearing and a petition for rehearing en banc was entered on April 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law ..."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him...."

Title 18 U.S.C. §3583(d) provides in relevant part:

> Conditions of supervised release.--The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State,

> or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. ....
>
> The court may order, as a further condition of supervised release, to the extent that such condition--
>
> (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
>
> (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
>
> (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.

The non-mandatory conditions which may [or may not] be imposed by the sentencing court are divided into "standard" conditions and "special" conditions which are set forth in U.S.S.G.§§5D1.3(c) and (d). The first "standard" conditions are set forth in U.S.S.G.§5D1.3(c) as follows:

> The following "standard" conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:
>
> (1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.

Federal Rules of Criminal Procedure Rule 43 provides in relevant part:

The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including

the impaneling of the jury and the return of the verdict, and at the imposition of sentence.

STATEMENT OF THE CASE

The imposition of punishment in a criminal case affects the most fundamental human rights: life and liberty. Sentencing should be conducted with the judge and defendant facing one another and not in secret. It is incumbent upon a sentencing judge to choose his words carefully so that the defendant is aware of his sentence when he leaves the courtroom. *United States v. Villano*, 816 F.2d 1448, 1452 (10th Cir. 1987)

The fundamental question in this case is whether the practice of the sentencing courts in the Eastern Districts of New York to include the "standard" discretionary conditions of supervised release in the written judgment although they were not imposed by the court at sentencing, constitutes an impermissible variance from the sentence in violation of Petitioner's Fifth Amendment right to due process, the confrontation clause of the Sixth Amendment, and of Rule 43 of the Federal Rules of Criminal Procedure.

This petition for certiorari arises in the context of the district court's denial of Petitioner's Motion, pursuant to Federal Rules of Criminal Procedure Rule 32, to resettle the Judgment of Conviction (App D) to exclude those conditions of supervised release which were not imposed at sentencing.

This case presents a situation in which the court *sua sponte* and without any justifying change in circumstances belatedly imposed upon Petitioner the "standard" conditions of supervised release which were not orally imposed at sentence. Specifically the district court held that the use of the written Judgment to amend the conditions of supervised release to include the "Standard Conditions" following oral imposition of sentence

does not constitute an impermissible variance from the sentence (App. B at 12a).

The Court of Appeals affirmed the decision of the district court by substituting its own view for the plain language of the statute. The statute makes a clear distinction between the mandatory conditions of supervised release as set forth in Title 18 U.S.C. §3583(d) and the discretionary conditions of supervised release which may (or may not) be imposed by the court at sentencing. Unlike the mandatory conditions, the "standard" conditions may not be presumed to be imposed because they are discretionary. By its ruling, the Court of Appeals for the Second Circuit judicially converted the discretionary Standard Conditions of Supervised Release into Mandatory Conditions on the theory that the standard conditions are generally appropriate to effect the purpose of supervised release and therefore need not be orally imposed by the court at sentence.

A. Background Of The Rule 32 Motion

On December 8, 1995, Petitioner was sentenced pursuant to a plea agreement to nine months imprisonment to be followed by three years of supervised release.

Prior to acceptance of Petitioner's plea, the Court reiterated the terms of the Plea Agreement and advised Petitioner that after any prison term he would be placed on supervised release for a maximum period of three years (App. E at 30a). No mention was made by the Court or the Government that any discretionary conditions of supervised release would be imposed. Pursuant to the Plea Agreement and the statements made by the Court on that date, Petitioner pled guilty to that part of Count Ten of the Superseding Indictment which charged that:

> in or about 1990 or 1991, in the Eastern District of New York [he] agreed to defraud the United States by ...

impeding the Department of Treasury in the computation of taxes with regard to DeLuxe Homes of Pennsylvania, Inc.(App. E at 32a),

On December 8 1996, Petitioner was sentenced by the Honorable Sterling Johnson, United States District Court of the Eastern District of New York, as follows:

THE COURT: I'm going to sentence the defendant to the custody of the Attorney General for a period of nine months, that the defendant make restitution in the amount of twenty-two thousand two hundred and thirty dollars, the terms of that restitution to be worked out with the Probation Department, and a $50.00 special assessment.

THE COURT: Any outstanding counts?

MS. RHODE: The underlying indictment we would move to dismiss it.

THE COURT: Supervised release for a period of three years.

(App. F at 40a)

No discretionary conditions of supervised released, as permitted by 18 U.S.C.§3583(d)(1-3) and U.S.S.G. §5B1.4, were imposed on Petitioner. Indeed, the sentencing court gave no indication at sentencing that the term of supervised release was subject to any of the non-mandatory conditions set forth in the Guidelines. Thus pursuant to the terms imposed by the district court at sentencing, Petitioner was on notice that he was subject only to the mandatory conditions of supervised

release, as set forth in 18 U.S.C.§3583(d) and U.S.S.G.§5B1.3[1], i.e., that he not commit another federal, state or local crime during the period of supervised release and that he not possess illegal controlled substances. Based on the sentencing proceeding of December 8, Petitioner reasonably understood that, other than the terms and conditions set forth above, no other liberty interest would be impaired as a result of his sentence. There were no further proceeding in connection with the sentence.

Subsequent to the imposition of sentence and in contrast to the sentencing court's oral pronouncement, and in the absence of Petitioner, Judge Johnson signed a Judgment and Commitment Order which incorporated fourteen conditions of supervised release (App. D at 24a-25a-5). In addition to the mandatory conditions of supervised release that he not commit another federal, state or local crime during the period of supervised release (App. D at 25a-2) and that he not possess illegal controlled substances (App. D at 25a-3), the written Judgment imposed twelve other conditions, which were not imposed by the district court at sentencing and which are not included under the mandatory conditions of the Sentencing Guidelines. U.S.S.G.§5B1.4[1]

Petitioner was subsequently remanded to the Federal Correctional Facility at Loretto, Pennsylvania where he served a nine month term of imprisonment (App. G at 41a). Upon his release from custody, Petitioner met with his probation officer, where, in the presence of counsel, he was provided with a written statement setting forth thirteen conditions of supervised release, which substantially mirrored the conditions imposed by the

---

[1] At the time he was sentenced, the standard conditions of supervised release were listed in the Sentencing Guidelines under section 5B1.4. In 1997, section 5B1.4 was deleted and the standard conditions now fall under section 5D1.3. The original reference is used because it applies to the guidelines under which Petitioner was sentenced.

written judgment (App. G at 43a). Petitioner was advised by the Probation Officer that the Probation Department intended to be guided by all of the conditions as set forth in Judgment and Commitment Order and that he was expected to adhere to them.

Each and every one of the twelve non-mandatory conditions set forth in the written judgment impairs a substantial liberty interest such as Petitioner's fundamental rights of privacy and movement and his First Amendment right of freedom of association, his Fourth Amendment right to be free from warrantless search and seizure and his Fifth Amendment right against self-incrimination.

Petitioner immediately challenged the legality of use of the written judgment to impose discretionary conditions which had not been imposed at sentence. and reserved his right to protest by appropriate application to the Court (App. G at 43a - 44a) . Thereafter, Petitioner moved pursuant to the Federal Rules of Criminal Procedure Rule 32 to resettle the Judgment and Commitment Order eliminating the non-mandatory standard conditions of supervised release to conform the Judgment to the sentence imposed by the district court on December 8, 1995 (App. G at 41a).

B. The Decision Of The District Court

At oral argument on the Motion, the Government argued that it is the practice of the sentencing courts of the Eastern District of New York to use the written judgment to impose the "standard" conditions of supervised release, in lieu of the oral sentence (App. H at 52a). The District Court acknowledged that when it pronounced the sentence, which included a three year term of supervised release, it failed to impose any of the non-mandatory conditions of supervised release upon Petitioner (App. B at 13a). Nevertheless the District Court denied

Petitioner's motion to resettle the Judgment and Commitment Order eliminating these conditions holding, *inter alia*: (1) that the imposition of non-mandatory standard conditions of supervised release, in the absence of defendant and after sentence had been imposed, does not create an impermissible variance between the judgment and the sentence (App. B at 12a); (2) that, in any event, the use of the written judgment to amend the conditions of supervised release following imposition of sentence was harmless error (App. B at 13a); and (3) that, even in the absence of changed circumstances, the sentencing court has the right, pursuant to 18 U.S.C. 3583(e)(2), to amend the sentence and enlarge the conditions of supervised release (App. B at 19a).

C. The Decision of the Court of Appeals

In a decision rendered January 22, 1999, the Court of Appeals held that inclusion of the standard conditions of supervised release in the written judgment "did not alter the oral sentence but merely provided an explanation of what that supervised release entailed" (App. A at 2a).

The decision of the Court of Appeals extended its prior ruling in *United States v. Smith,* 982 F2d 757, 764 (2d Cir, 1992) in which it held that even the most general allusion to the "standard conditions" of supervised release suffices for their enumeration in the written judgment to completely eliminate the requirement that these non-mandatory conditions be imposed at all (App. A at 4a)..

The Court of Appeals acknowledged that, pursuant to the statutory scheme, the "standard conditions" of supervised release are "discretionary". Nonetheless, the Court of Appeals substituted its own judgment for that of Congress by reasoning that

> many of the standard conditions are so clearly necessary to supervised release, that the term "discretionary" may be a misleading, if technically accurate, modifier for the standard conditions (App. A at 6a).

In an arabesque leap of logic the Second Circuit concluded that because the standard conditions of supervised release are "boilerplate" and "routinely imposed", they are, therefore, mandatory, and that Petitioner should have been on notice that they were part of supervised release, even though the sentencing court failed to impose them at sentence (App. A at 5a) .

Thus, the Court of Appeals, in contravention of the legislative intent, judicially converted the discretionary standard conditions of supervised release into mandatory conditions which need not be orally imposed (nor even referred to) at sentence.

REASONS FOR GRANTING THE WRIT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINIONS BELOW AFFIRMS A SENTENCING PRACTICE IN THE EASTERN DISTRICT OF NEW YORK WHICH IS CONTRARY TO THE WILL OF CONGRESS AND VIOLATIVE OF THE FIFTH AND SIXTH AMENDMENTS OF THE CONSTITUTION.

The right to be present at sentencing has its roots in the Due Process and Confrontation Clauses of the United States Constitution. *Pollard v. United States,* 352 U.S. 354, 363, 77 S.Ct. 481,487, 1 L.Ed.2d 393, 400-401 (1957). This Constitutional principle is codified in Rule 43 of the Federal Rules of Criminal Procedure which provides in pertinent part:

> [t]he defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence ... [emphasis added]

In contrast to parole [2], which was "conferred as a privilege, and ... [not] a right" *Burns v. United States*, 287 U.S. 216, 220 53 S.Ct. 154, 155 (1932) the question of whether a defendant will be supervised following his term of imprisonment is dependent on whether the judge concludes that he needs supervision, rather than on the question of whether a particular amount of his term of imprisonment remains. Unlike parole, which preceded it, or even probation, supervised release is not a "period of grace, free from confinement, [in exchange for which] the defendant knowingly accepts the abridgment of absolute liberty which ordinary citizens enjoy." *United States v. Beech-Nut Nutrition Corp.*, 925 F.2d 601, 604 (2nd Cir. 1991). Rather, the imposition of conditions of supervised release are statutorily deemed to be part of a sentence and Congress has placed upon the Court the affirmative responsibility to advise the defendant, in open court, of those conditions of supervised release to which he is subject. 18 U.S.C.§3583(d).

Because the written judgment and commitment is nothing more than mere evidence of the sentence imposed orally in court by the judge, the only sentence that is legally cognizable is the actual oral pronouncement in the presence of the defendant.

---

[2] By concluding that Appellant "has greatly profited from a system that balances the defendant's rehabilitation with the need to protect the public" (App B at 94a), the District Court fails to recognize the fundamental distinction between parole and supervised release. As distinguished from parole, a term of supervised release is a separate part of the sentence. Senate Report No. 225, 98th Cong. 1st Sess. 1983, 1984 U.S.C.C.A.N. 3182.

Thus, where there is a variance between the oral pronouncement of sentence and the written judgment of conviction, the oral sentence controls. See *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 463-464, 56 S.Ct. 760, 762, 80 L.Ed. 1283 (1936). Anything less would violate a defendant's constitutional right to be present when he is sentenced. See *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985) (per curiam).

After imposing sentence in a defendant's presence, the sentencing court cannot thereafter increase the sentence in the defendant's absence. *Bartone v. United States*, 375 U.S. 52, 84 S.Ct. 21, 11 L.Ed.2d 11 (1963). Moreover, as this Court indicated in *Bartone*, 375 U.S. at 53-54, 84 S.Ct. at 22, the error in enlarging the sentence in the absence of a defendant is so plain in light of the requirements of Rule 43, that Courts of Appeals under their broad supervisory powers should correct such errors even if they have not been alleged on appeal.

Petitioner does not contest the right of the sentencing court to impose conditions of supervised release that are consistent with the statutory scheme which drives the Sentencing Reform Act of 1986. 18 U.S.C.§3553(a)(2) and 3583(d). Nor does Petitioner assert that the sentencing court must provide reasons for imposing each of the standard conditions. Rather, Petitioner argues that Congress has placed upon the sentencing court the affirmative responsibility to advise him, in open court, of those conditions of supervised release to which he is subject.

Significantly in other districts, where sentencing courts have intended to impose these standard conditions, they have done so by making at least some general reference to them at sentencing in the presence of defendant. (See *for example,* "...as conditions of his supervised release, [the defendant] shall abide by the Standard Conditions of Supervision 1 through 13, Guidelines S 5B1.4(a)" [emphasis added]; *United States v. Hoffenberg*, 1997

WL 96563, 15 (S.D.N.Y. 1997); "as conditions of supervised release, [defendant] shall abide by the standard conditions of supervised release as recommended by the Guidelines."[emphasis added]; *United States v. Matos*, 1991 WL 143498, 1 (S.D.N.Y.1991); See also *United States v. Jerez*, 1998 WL 125525 (S.D.N.Y 1998) ; *Gordils v. United States* 1996 WL 614139, 10 (S.D.N.Y.1996); *United States v. Montoya*, 1996 WL 276359, 2 (S.D.N.Y. 1996); *United States v. Armstrong*, 842 F.Supp. 92, 96 (S.D.N.Y. 1996); *United States v. Gross*, 1994 WL 62808 (S.D.N.Y. 1994); *United States v. Lucchese*, 1993 WL 385802, 2 (S.D.N.Y. 1993); *United States v. Reyes*,1992 WL 110987, 1 (S.D.N.Y. 1992); *Jimenez v. United States*, 1990 WL 176386 (S.D.N.Y. 1990).

In the case at bar, the district court failed to make even the most general allusion to the "standard conditions" of supervised release, thus depriving Petitioner of his Sixth Amendment Right of Confrontation. Had the Court made even the most general reference to the standard conditions of supervised release at sentencing, Petitioner would have been put on notice and could have been heard on any one of those conditions which he believed should not be applied to him. Because these conditions are discretionary, not mandatory, the Court could have changed its mind regarding any single one of them. However Petitioner had no opportunity to be heard, because he had no notice that the Court intended to impose any condition other than those that are statutorily mandated.

If, in accordance with the decisions below, the standard conditions of supervised release need not be imposed at sentence, then Petitioner was sentenced not when he appeared before Judge Johnson, but at some later time when the commitment was signed. Thus, the sentence would be invalid since Petitioner was not present. See *Pollard v. United States*, 352 U.S. 354, 360 n. 4, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957).

A. The Inclusion Of Discretionary Conditions Of Supervised Release In The Judgment and Commitment Order Which Were Not Pronounced At Sentence Creates An Impermissible Variance Between The Judgment and Commitment Order And The Sentence.

A "variance" is defined as follows:

> [a] discrepancy or disagreement between two instruments or two pleading allegations in the same cause, which should by law be entirely consonant ... [emphasis added]

Black's Law Dictionary, Sixth Edition

In the case at bar, the discrepancy between the oral pronouncement and the Judgment and Commitment Order could not be more apparent. The oral pronouncement at sentencing imposed upon Petitioner three years of supervised release (App. F at 40a). Other than the special condition of restitution, imposed at sentence, the oral pronouncement made no reference to any other conditions. In contrast, the written judgment, which was executed after sentence had been pronounced, imposed fourteen conditions of supervised release, twelve of which were discretionary and which were not reflected anywhere in the sentencing minutes.

The decision of the Court of Appeals attempts to eliminate the impermissible variance between the oral pronouncement and the written judgment on the theory that because the twelve conditions are "standard", they are therefore "presumed" to be incorporated in any term of supervised release and need not be orally imposed at sentence (App. A at 5a - 6a). This interpretation of the Sentencing Guidelines is clear error.

Under the Sentencing Reform Act of 1986 there are no standard conditions of supervised release which are applicable to all defendants. Rather there are mandatory and discretionary conditions. *United States v. Smith*, 982 F.2d 757 (2nd Cir. 1992).

As distinguished from the mandatory conditions which are statutorily imposed on every defendant who is subject to a term of supervised release, pursuant to 18 U.S.C.§3583(d), the Court, at its discretion, may order the imposition of additional discretionary conditions of supervised release on the defendant pursuant to U.S.S.G.§5B1.4. These discretionary conditions are divided into thirteen "standard" conditions and twelve "special conditions". U.S.S.G.§§5B1.4(a) and (b).

At the time Petitioner was sentenced, the first thirteen conditions which were contained within U.S.S.G.§5B1.4(a) were listed as:

> "standard" conditions [which] are generally recommended for both probation and supervised release.(quotation in original) [emphasis added]

As distinguished from the standard conditions which, pre-guidelines were applicable to parole, both the "standard"[3] and the "special" recommended conditions of supervised release are discretionary. *Smith*, 982 F.2d at 764

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[3] The "Judgment in a Criminal Case Form" lists the standard conditions of probation and supervised release and represents the policy adopted by the Judicial Conference. This form is optional; judges may add to or subtract from the listed "standard" conditions" See U.S.S.G.§5B1.4(b) (17)-(18) (policy statement)and Administrative Office of the U.S. Courts, Judgment in a Criminal Case Form (1995).

The difference between the "standard" discretionary conditions and the "special" discretionary conditions does not lie in the obligation of the Court to orally impose them at sentence. Rather it lies in the obligation of the court to make factual findings and articulate a reason for the imposition of special conditions. Significantly, in *Smith*, 982 F.2d at 764, the Second Circuit held that, as to the "standard conditions" of supervised release "while a court must conduct the analysis this section requires, it need not analyze the factors on the record for each condition".[4] The extension of Smith to eliminate the requirement to impose these conditions at all permits the district courts to act in derogation of their statutory responsibility. 18 U.S.C.§3583(d)

Significantly, the decision of the Court of Appeals in the case at bar, is the only instance that Petitioner's research has uncovered which has called into doubt the requirement that some reference be made to the standard conditions of supervised release at sentencing in order for them to be incorporated as part of the sentence.

There is no authority, other than the decision below, which stands for the novel principle that either the "standard" discretionary conditions or the "special" discretionary conditions may routinely be imposed after sentence and in the absence of a defendant.

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[4] Petitioner does not claim that the Court was obliged to "read at sentencing each of the standard conditions imposed on defendant" (App. B at 14a). Indeed, it would have sufficed had the court simply stated during sentencing, as it does in other districts, that the terms and conditions of Petitioner's supervised release included, in addition to the mandatory conditions, the discretionary "standard" conditions recommended by the Sentencing Guidelines. See *United States v. Smith*, 982 F.2d at 764.

B. The Judgment and Commitment Order May Not Be Used To Enlarge The Terms And Conditions Of Supervised Release Which Were Imposed At Sentence.

It is well settled that the only circumstance in which a commitment order may be used to cure the Court's failure to state the conditions of supervised release during sentencing in the presence of defendant is when the conditions are statutorily mandated and the failure to impose them would result in the imposition of an illegal sentence. See *for example United States v. Strozier*, 940 F.2d 985, 987 (6th Cir. 1991)

Thus the sentencing court cannot delegate the authority to the Department of Probation to include non-mandatory conditions of supervised release which were not imposed at sentence.

As this Court stated in *United States v. Behrens*, 375 U.S. at 165-166, 84 S.Ct. at 297, 11 L.Ed.2d 244 (1963):

> [The] right [to be present at sentence], ancient in the law, is recognized by Rule 32(a) of the Federal Criminal Rules, which requires the court to afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation or punishment. This right would be largely lost ... if for administrative convenience the defendant were not permitted to invoke it when the sentence that counts is pronounced.

Consistent with *Behrens*, and in marked contrast to its decision in the case at bar, in *U.S. v. Porter*, 41 F.3d 68 (2nd Cir. 1994), the Court of Appeals held that a sentencing court could not authorize a probation officer to make a post sentencing decision as to amount of restitution or scheduling of installment payments, stating:

> we do not purport to tell the district judge what he should do: we instruct him only as to what he cannot do; i.e., he cannot delegate the judicial functions inherent in the grant of restitution to the probation department.

See also: *U.S. v. Workman,* 110 F.3d 915, 198 (2nd Cir. 1997); *U.S. v. Mortimer, 94 F.3d 89, 90 (2nd Cir. 1996); U.S. v. Doe,* 79 F.3d 1309, 1314 (2nd Cir. 1996); *U.S. v. Khan,* 53 F.3d 507, 519 (2nd Cir. 1995); *U.S. v. Kassak,* 47 F.3d 562, 568 (2nd Cir. 1995). (see also (a district court may only amend a sentence after it has been imposed to conform it to the mandatory provisions of the Sentencing Guidelines.)

Prior to the decision below, there was no authority to justify the use of the written judgment to "administratively" modify the conditions of supervised release imposed upon a defendant at sentencing. The decision below transforms a judicial function of constitutional proportions into an administrative task and violates Petitioner's constitutional right to be present at sentence and to be afforded an opportunity to make a statement on his own behalf.

It further stands the legislative intent of the statute on its head. Senate Report No. 95-225, states that an error in the recitation of the conditions in the statement provided by probation or even an accidental failure by probation to provide such a statement, should not necessarily be construed as a reason to impugn the propriety or validity of a decision to revoke or modify the probation, because of a breach of a condition actually imposed, "since the court will have stated those conditions during the sentencing proceeding in any event." [emphasis added].

If permitted to stand, the ruling of the Second Circuit will set a new and dangerous precedent permitting the abdication of judicial authority by converting the written judgment into the

"sentence that counts" by impermissibly using it to add new conditions of supervised release which were never imposed at sentence.

C. The Silence of the Sentencing Court Regarding The Conditions of Supervised Release Does Not Render The Sentence Ambiguous.

The reasoning of the Court of Appeals, that the failure to notify Petitioner of the terms and conditions of supervised release at most created an ambiguity in the sentence which was clarified by the written judgment, is plain error (App. A at 4a). The addition of non-mandatory conditions of supervised release did not simply clarify the sentence, it enhanced it in violation of Petitioner's reasonable expectation of finality and his fundamental right to be present and to be heard when sentence is imposed. Fed. R.Crim.P. 43(a), *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482-1484-85, 84 L.Ed.2d 486 (1985); *Lewis v. United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1982).

Rule 43(a) of the Federal Rules of Criminal Procedure mandates that "[t]he defendant shall be present ... at the imposition of sentence...." Rule 43 has its source in the confrontation clause of the sixth amendment and the due process clause of the fifth and fourteenth amendments. *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482, 1484-85, 84 L.Ed.2d 486 (1985). Although it is not an absolute right, *Illinois v. Allen*, 397 U.S. 337, 342, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), it is fundamental to the entire law of criminal procedure. *Lewis v. United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892) (dictates of humanity require defendant's presence). Accordingly, a defendant is present only when being sentenced from the bench. Thus, a defendant is impermissibly sentenced *in absentia*, when the judgment and commitment order is allowed to control when there is a conflict.

Changing the rule as suggested by the decision below endangers a defendant's constitutionally protected right to be present at sentencing. *Arizona v. Fulminante*, 499 U.S. 279, 311,111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991); *United States v. Behrens*, 375 U.S. 162, 165-166, 84 S.Ct. 295, 297, 11 L. Ed. 2d 244 (1963) .

Moreover, the use of the written judgment to add new conditions of supervised release which were never imposed at sentence under the guise of "clarification" (App. A at 4a) impermissibly introduces an element of conjecture into the sentencing process which is wholly contrary to the principles of due process which are the underpinnings of American jurisprudence. See *Bartone v. United States*, 375 U.S. 52, 53, 84 S.Ct. 21, 22, 11 L.Ed.2d 11 (1963) (*per curiam*). The impermissible variance between the conditions imposed at sentencing and the written judgment can only be reconciled by shifting the burden to Petitioner to guess what conditions of supervised release, if any, may have been imposed by the Court at sentence. The reasoning below, that because Petitioner was aware that he was subject to a term of supervised release, he should have known that he would be subject to the standard conditions which were not imposed at sentence, but which later appeared in the written judgment is fundamentally flawed (App. B at 14a).

As opposed to the mandatory conditions set forth in U.S.S.G.§5B1.3 which are statutorily imposed upon all defendants who are sentenced to a term of supervised release and of which defendants may be said to have constructive knowledge, the enumeration in the Guidelines of a list of conditions which may be imposed by the court at sentencing is not effective notice that the court is actually contemplating any particular restriction, or indeed, any restriction at all.

In the absence of any reference to the imposition of specific conditions of supervised release, Petitioner had every right to

rely on the oral pronouncement of the court at sentencing and on the opinion of his counsel that he would be subject only to the mandatory provisions of supervised release as set forth in U.S.S.G. §5B1.3. The reasoning of the court below, taken to its logical conclusion, leaves a defendant to guess which condition, if any, will be applied at sentencing and which conditions will ultimately appear in the written judgment; and in the event of a discrepancy between the two, which will prevail

It is respectfully submitted that if permitted to stand this holding opens the door to the impermissible amendment of a sentence in violation of a defendant's reasonable expectation of finality in sentencing and his constitutional right to be present and to be heard when sentence is imposed. Fed. R. Crim. P. 48(a); *United States v. Gagnon,* 470 U.S. 522, 105 S.Ct. 1482-1484-85, 84 L.Ed.2d 486 (1985); *Lewis v. United States,* 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1982).

II

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE "STANDARD CONDITIONS OF SUPERVISED RELEASE" MAY BE RENDERED MANDATORY BY JUDICIAL CONSTRUCTION OF THE STATUTE.

It has long been settled that in interpreting a statute, courts must first look to the language of the statute itself. See *The Greenery Rehabilitation Group, Inc.* v *Hammon,* 150 F.3d 226, 231 (2nd Cir. 1998); *Tom Lange Co. v. Kornblum & Co.*, 81 F.3d 280, 285-86 (2d Cir.1996). The plain meaning rule of statutory construction, as articulated by Justice Day more than a century ago in *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917) declares:

> It is elementary that the meaning of a statute must be sought in the language in which the act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its terms.

This Court has consistently held that if the statutory terms are unambiguous, the court's review generally ends and the statute is construed according to the plain meaning of its words.[5] See *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). It is only where "doubt or ambiguity resides in a Congressional enactment ... may legislative history and other tools of interpretation beyond a plain reading of the statute's words" be used to interpret the statute. *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir.1993).

As noted *supra*, Title 18 U.S.C. §3583(d) sets forth the mandatory conditions applicable to every individual who is subject to a term of supervised release The statute provides in relevant part that:

> The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. ...

In addition to the above statutorily imposed mandatory conditions, 18 U.S.C. §3583(d) provides that a sentencing court may order as further conditions of supervised release:

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[5] Unless otherwise defined, individual statutory words are assumed to carry their ordinary, contemporary, common meaning. *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 143 (2d Cir.1997) (quotation and citation omitted) *cert. denied*, U.S. ----, 118 S.Ct. 1839, 140 L.Ed.2d 1089 (1998); see also *United States v. Piervinanzi*, 23 F.3d 670, 677 (2d Cir.1994).

> any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. [emphasis added]

These discretionary conditions which may [or may not] be imposed by the court at sentencing are divided into thirteen "standard" conditions and twelve "special conditions". U.S.S.G. §§5D1.3(c) and (d). In contrast to the statutorily mandatory conditions, the conditions contained within U.S.S.G.§5B1.4(a) "are

> "standard" conditions [which] are generally recommended for both probation and supervised release." [quotation in original][emphasis added].

"Standard" is "a common descriptive word connoting stability, general recognition, and conformity to established practice" *Standard Accident Insurance Co. v. Standard Surety & Casualty Co.*, 53 F.2d 119, 120 (D.C.N.Y. 1931). It does not mean universally applicable or required. Similarly, the plain meaning of the term "recommend" is defined as "an action which is advisory in nature rather than one having any binding effect." See Black's Law Dictionary, Sixth Edition at 962; *People v. Gates*, 41 Cal.App.3d 590, 598, 116 Cal.Rptr. 172, 177 (1974). The plain meaning of "generally" is defined as "Being usually the case; true or applicable in most instances but not all" American Heritage Dictionary of the English Language, 3rd Ed.

Any plain meaning analysis of the statutory language which describes the "standard" conditions reveals Congress' intent that the imposition of these conditions is left to the sound discretion of the sentencing court which may impose one, all or none of them. See Policy Statement to U.S.S.G. §5B1.4(b)(17-18) and Administrative Office of the U.S. Courts, Judgment in a Criminal Case Form (1995) which articulates the policy adopted by the

Judicial Conference that the use of the form is optional and that judges may add to or subtract from the listed "standard" conditions.

The distinction between the mandatory and discretionary "standard" conditions goes right to the intent of the Congress in enacting the Sentencing Reform Act. Because the policy underlying supervised release is to "involve no greater deprivation of liberty than is reasonably necessary for the purposes" set forth in the statutory scheme, 18 U.S.C. 3583(d), it has been noted that

> supervised release, however, can be essentially unsupervised if a court chooses not to impose any conditions in addition to those required by statute. The mandatory conditions of supervised release generally do not necessitate supervision. In contrast, a discretionary condition requiring the defendant to report to a probation officer would necessitate supervision of the defendant.

"The Alpha & Omega of Supervised Release" by Harold Baer, ALBANY LAW REVIEW, 1996, 60 ALBLR 267, 270.

Accordingly, in stark contrast to its decision in the case at bar, the Second Circuit held in *United States v. Smith*, 982 F.2d 757, 764 (2nd Cir. 1992), that even

> regular meetings with a probation officer is not a mandatory condition of supervised release under 18 U.S.C. S 3583(d) ... However, section 3583(d) indicates that the court <u>may</u> impose additional, discretionary conditions. [emphasis added]

In contrast to the mandatory conditions of supervised release which the court is obliged to imposed on all defendants who are subject to a term of supervised release, the "standard conditions"

are discretionary. Although generally recommended, they are not uniformly applicable to all defendants subject to a term of supervised release, and may be imposed by the court in whole, in part or not at all.

The holding of the court below that "because the so-called "standard conditions" imposed in this case are basic administrative requirement[s] essential to the functioning of the supervised release system" [which] ... have become "boilerplate", they are presumed to be applicable to all defendants subject to a term of supervised release and need not be imposed at sentencing, is wholly inconsistent with the plain meaning of the statute. (App A Opinion at 4)

In drafting the language of 18 U.S.C. 3583(d) Congress clearly expressed its intent as to which provisions were universally applicable to all defendants subject to a term of supervised release. In addition to the general proscription on the illegal possession controlled substances and the commission of another crime, Congress enacted special mandatory conditions for first time defendants convicted of domestic violence and other crimes. If it was the intention of the legislature to incorporate by reference the thirteen "standard" conditions of supervised release as set forth in U.S.S.G.5§(c), *supra*, because it believed that they are basic administrative requirements essential to the functioning of the supervised release system, it would have had no trouble doing so. Congress chose not to do so.

In *Sullivan v. Stroop* 496 U.S. 478, 482, 110 S.Ct. 2499, 2502-2503, 110 L.Ed.2d 438 (1990), this Court held:

> If the statute is clear and unambiguous "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." ... In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at

issue, as well as the language and design of the statute as a whole.

It is respectfully submitted that the same reasoning is equally applicable to the case at bar. There is nothing in the legislative history that contradicts the plain meaning of 18 U.S.C. §3583. Nor is there anything which evinces Congress' intent that "many of the standard conditions are so clearly necessary to supervised release, that the term "discretionary" may be a misleading, if technically accurate, modifier for the standard conditions" (App. A:_Opinion at 5). There is simply no basis to adopt a construction which judicially expands the language of the statute to convert the non-mandatory conditions into mandatory conditions applicable to all defendants regardless of whether they are orally imposed by the Court at sentencing.

CONCLUSION

In conclusion, where the court below impermissibly substituted its will for that of Congress by judicially converting the discretionary Standard Conditions of Supervised Release into Mandatory Conditions thereby enlarging the sentence imposed upon Petitioner after sentence had been imposed and in Petitioner's absence, this case merits plenary consideration on certiorari.

Respectfully submitted

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Appendix A - Decision and Order of the United States Court of Appeals for the Second Circuit.

Appeal from an order of the United States District Court for the Eastern District of New York (Johnson, *Judge*) denying Defendant-Appellant Crea's motion to resettle the judgment.

Affirmed.

BRIDGET M. ROHDE, Assistant United States Attorney, Brooklyn, NY (Zachary W. Carter, United States Attorney, Eastern District of New York, Brooklyn, NY, Emily Berger, Assistant United States Attorney, Brooklyn, NY, on brief), *for Appellee.*

PAUL A. VICTOR, New York City (Dublirer, Hadon, Straci & Victor, New York City, Flora Edwards, New York City, of Counsel, Betty M. Crea, New York City, of Counsel, on brief), *for Defendant-Appellant.*

CASEY, *District Judge:*

PRELIMINARY

Steven Crea appeals from the district court's denial of his motion to resettle his sentence to delete certain conditions of his supervised release that were listed in a written Judgment and Commitment Order (the "J & C") after his oral sentence was imposed. Crea argues, *inter alia*, that under Federal Rule of Criminal Procedure 43, his oral sentence should control because the J & C contained additional conditions to his supervised release. For the reasons discussed below, we need not reach

Crea's remaining arguments because the above issue is dispositive. The J & C's enumeration of the conditions of supervised release did not alter the oral sentence, but merely provided an explanation of what that supervised release entailed. Accordingly, Crea's motion to modify the J & C to conform to his oral sentence is denied.

BACKGROUND

Defendant-appellant Crea entered into a plea agreement, pleading guilty to conspiracy to defraud the United States in violation of 18 U.S.C. § 371.[1] On December 8, 1995, he was sentenced before Judge Sterling Johnson, Jr. to nine months imprisonment, which he served, and three years supervised release with the special condition that he pay $22,230 in restitution, and a $50 special assessment. Although Judge Johnson's oral pronouncement of sentence did not articulate the standard conditions of supervised release, the written J & C included fourteen requirements listed as "standard conditions."[2] Arguing that the J & C's inclusion of the standard conditions was not consistent with his oral sentence, Crea moved before Judge Johnson to correct the J & C to conform to his oral sentence. Crea's motion was denied by Memorandum and Order, dated June 26, 1997. See, *United States v. Crea*, 968 F.Supp. 826 (E.D.N.Y. 1997).

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[1] The plea agreement stated that Crea would be subject to a range of imprisonment of 6 to 12 months, based on a guideline offensive level of 10; a term of supervised release to follow imprisonment; a maximum fine of $250,000; restitution of $22,500; and a $50 special assessment.

[2] Standard condition #1, as listed in Crea's J & C, was actually a mandatory condition.

DISCUSSION

Implicit in the very nature of supervised release is that certain conditions are necessary to effect its purpose. Crea's appeal must be denied simply because there is no conflict between the oral sentence imposed by Judge Johnson and the written J & C reflecting that oral sentence. Federal Rule of Criminal Procedure 43 requires that a defendant be present at the imposition of his sentence. When a J & C conflicts with the oral sentence, Rule 43's requirement that the defendant be present for his sentence is violated. *See United States v. Werber*, 51 F.3d 342, 347 (2d Cir. 1995). Accordingly, this Circuit has held that "where there is a *direct conflict* between an unambiguous oral pronouncement of sentence and the written judgment and commitment . . . the oral pronouncement . . . must control." *United States v. Marquez*, 506 F.2d 620, 622 (2d Cir. 1974) (emphasis added) (internal quotation marks omitted); *see also United States v. DeMartino*, 112 F.3d 75, 78-79 (2d Cir. 1997); *Werber*, 51 F.3d at 347; *United States v. Moyles*, 724 F.2d 29, 30 (2d Cir. 1983).

Crea's reliance on certain of these cases, however, is misplaced, for they involved actual inconsistencies, whereas it is equally well established that it is permissible for the written judgment to resolve genuine ambiguities in the oral sentence, *see, e.g., United States v. Pugliese*, 860 F.2d 25, 30 (2d Cir. 1988); *Moyles*, 724 F.2d at 30. Thus, on the one hand, we held in *Marquez* that it was impermissible to impose a simple fine orally and then, in the written judgment, to impose instead a committed fine, the consequence of nonpayment of which would be imprisonment. *See* 506 F.2d at 622. And in *DeMartino*, we vacated a written judgment imposing a 63-month term of imprisonment when the court had orally pronounced a 48-month term. *See* 112 F.3d at 80-81; *id.* at 79 (after pronouncing sentence orally, district court not allowed to enter a conflicting written judgment because it "change[d] its mine about the

appropriateness of the sentence" (internal quotation marks omitted)).

On the other hand, where there was no real inconsistency but rather an ambiguity, we have upheld the written judgment. For example, where the sentencing court was silent with regard to whether the terms of imprisonment were to be served concurrently or consecutively, the written judgment could permissible specify either. *See Pugliese*, 860 F.2d at 30. And where the sentencing judge's statement of intent to impose a special assessment was ambiguous, such an assessment could be imposed in the written judgment. *See United States v. Pagan*, 785 F.2d 378, 380 (2d Cir. 1986).

In the present case, we think it clear that the difference between the oral pronouncement of sentence and the written judgment did not amount to a conflict, but rather that the latter reflected a clarification of what the oral pronouncement meant by "supervised release." During Crea's plea colloquy, the trial court had made it clear that certain conditions would apply to Crea's term of supervised release, failure to comply with which would result in imprisonment. And at sentencing, the court reiterated that Crea would be required to serve a term of supervised release. The written judgment simply clarified the meaning of that sentence by specifying what the supervision was to entail.

In sum, there is no indication here that the written judgment changed the sentence that was pronounced orally. The oral pronouncement of sentence simply did not specify what the conditions of supervised release were to be; the specification of those conditions in the written judgment did not in any way conflict with the oral pronouncement.

Our view is buttressed by the fact that we previously have concluded that, at oral sentencing, even the most general allusion

to the "standard conditions" of supervised release is a sufficient basis on which to predicate the imposition of each of the conditions normally regarded as standard. *See United States v. Smith*, 982 F.2d 757, 759, 764 (2d Cir. 1992) (where sentencing court referred only to "standard conditions adopted by this court," those conditions were in effect imposed). Thus, explicit reference to each and every standard condition of supervision is not essential to the defendant's right to be present at sentencing.

Further, because the so-called "standard conditions" imposed in this case are "basic administrative requirement[s] essential to the functioning of the supervised release system" *Smith*, 982 F.2d at 764, they are almost uniformly imposed by the district courts and have become boilerplate.[3] For example, among the standard conditions, the defendant is required to: report to the probation officer at the officer's discretion, *see* U.S.S.G. § 5D1.3(c)(2); answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer, *see* U.S.S.G. § 5D1.3(c)(3); and notify the probation officer at least ten days prior to any change of residence or employment, *see* U.S.S.G. § 5D1.3(c)(6).

Most of the remaining standard conditions articulated in Crea's J & C are generally so appropriate to effect the purpose of supervised release that any argument by Crea that they constitute

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[3] Prior to this appeal, the standard conditions of supervised release were listed in the Sentencing Guidelines under section 5B1.4. In 1997, section 5B1.4 was deleted, and the standard conditions now fall under section 5D1.3. Despite Crea's repeated characterization of the conditions at issue as "discretionary," it is important to note that even after the 1997 amendments to the Sentencing Guidelines were enacted, Section 5D1.3(c) continued to list the conditions at issue as "standard conditions." While we have recognized that "the Sentencing Reform Act eliminated standard conditions, replacing them with mandatory and discretionary conditions," *Smith*, 982 F.2d at 764, the fact that the discretionary conditions are still labeled "standard" within the Guidelines evidences the extent to which they are regularly imposed and relied on by the district courts.

additional punishment, or are in conflict with his oral sentence, would be disingenuous. For example, U.S.S.G. § 5D1.3(c)(7)-(8) provides, in pertinent part, that the defendant shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance; and the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered. Thus, many of the standard conditions are so clearly necessary to supervised release, that the term "discretionary" may be a misleading, if technically accurate, modifier for the standard conditions.

Thus, Crea's argument that he would have to guess which of the standard conditions apply without the court's reference to them at oral sentence is unfounded.

CONCLUSION

Because of oral sentence was not in conflict with the J & C, Crea's additional grounds for appeal are irrelevant. The judgement of the district court is affirmed.

Appendix B - Judgment, Memorandum and Order of the United States District Court for the Eastern District of New York, dated June 26, 1997.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

STEVEN CREA,

Defendant.

93 CR 506 (SJ)

APPEARANCES:

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JOHNSON, District Judge:

BACKGROUND

On August 18, 1995 the Defendant, Steven Crea, pled guilty to conspiracy to defraud the United States Government. On December 8, 1995, the Defendant was sentenced to nine months imprisonment, various fines, restitution, and three years of supervised release. The Defendant served his sentence of imprisonment and was released from jail on November 7, 1996.

The Defendant then met with his probation officer, Mark J. Maffucci, who gave the Defendant a copy of the Judgment and Commitment Order. The Defendant also signed Probation Form 7A, titled "Conditions of Probation and Supervised Release" acknowledging his awareness of the conditions governing his term of supervised release. The Defendant protested the validity of the standard conditions, numbered one through thirteen on the form, by signing and writing in "I will abide by all conditions pending a review and determination by the Court regarding the scope of the Court order."[1]

The Defendant now moves to "resettle" the judgment to exclude these conditions from his term of supervised release. He argues that the United States Sentencing Guidelines ("U.S.S.G.") and related statutory authorities only mandate two conditions of supervised release; that the defendant not commit another Federal, state or local crime, and that the defendant not possess illegal controlled substances. The Defendant claims that because the Court did not specifically state on the record at sentencing that the Defendant would be subject to the standard conditions of supervised release as set forth in Probation Form 7A there is

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[1] A copy of this form is attached. These same conditions are also set forth in the Judgment and Commitment Order as conditions 2-7 and 9-14 and U.S.S.G. § 5B1.4(a) (1)-(13). Condition 7 of U.S.S.G. § 5B1.4 and Probation Form 7A is a paraphrase of the mandatory condition regarding controlled substances.

a "variance" between the oral and written sentencing pronouncements, and that he is not therefore subject to the conditions. The Defendant also challenges the Court's authority to modify the term of supervised release to include the standard conditions.

The Defendant claims that imposing the conditions constitutes an *ex post facto* modification of his sentence in violation of Federal Rule of Criminal Procedure 32.1(b). Defendant alleges violation of his rights to due process, privacy and movement, freedom of association, freedom from warrantless search and seizure[2] and his right against self-incrimination. Def. Mem. at 9.

For the reasons set forth below, the Defendant's motion is denied. The Defendant shall abide by each of the conditions set forth in Probation Form 7A and the Judgment and Commitment Order for the remainder of his term of supervised release. As informed by this Court at the plea colloquy, the Defendant may be returned to prison for up to two years for violating any of the standard conditions for the remainder of his term of supervised release.

DISCUSSION

The Defendant first argues that the conditions of supervised release were not properly imposed, and that he is therefore not bound by them. He then argues that the Court does not have the authority to impose the conditions at this time. Although the Court concludes that the conditions were properly imposed, in the interest of finality, the Court will address the Defendant's

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[2] This claims that the conditions subject him to search and seizure without a warrant is incorrect. The probation officer may visit the Defendant at any time, but may only confiscate "contraband *observed in plain view* by the probation officer." Probation Form 7A (10) (emphasis added).

argument regarding the Court's authority to modify the conditions of supervised release. The Court will first provide a brief overview of the purpose of supervised release to provide some context for the Defendant's arguments.

I. SUPERVISED RELEASE

Supervision is a means of protecting the public from those who have been deemed dangerous. The defendant is allowed a chance to readjust to society and an opportunity to learn how to live a life free of criminal activity. Supervised release is intended to impose reasonable restrictions on the Defendant's liberty in light of the Defendant's past criminal behavior, to provide the much-needed guidance of a probation officer, and to discourage activity which may lead to further crimes.[3]

Supervised release requires a defendant to alter his or her behavior, but compared to imprisonment, the conditions of supervised release impose a very minor infringement on a defendant's liberty. Simply put, individuals on supervised release are not entitled to the same liberties as others who have not been determined to need supervision. As recently stated by the Second Circuit Court of Appeals;

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[3] Courts have broad power to impose conditions of supervised release, and conditions are only reviewed for abuse of discretion. *United States v. Abrar*, 58 F.3d 43 (2d Cir. 1995). The Court may impose conditions that involve no greater deprivation of liberty than necessary, and that are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. §§ 3553(a)(2) and 3583(d).

> [T]he constitutionality of limitations on an individual's right to associate with those who have been convicted of unlawful activity has been upheld in a variety of contexts, most commonly to prevent a convicted defendant from associating with those who would lead him back into a life of crime. The government may, for instance, impose restrictions "reasonably and necessary related" to its continuing interest in a wrongdoer's rehabilitation, and in protecting the public from further criminal acts. *Sanitation and Recycling Indus. v. City of New York*, 107 F.3d 985, 998 (2d Cir. 1997).

Crea alleges that the condition prohibiting his association with convicted felons "burdens [his] First Amendment right of freedom of association" and "directly impacts his ability to maintain his livelihood." Def. Not. of Mot. at ¶14. Crea pled guilty to conspiracy, thus rendering his past associations especially relevant to his criminal history and future propensity for crime. This condition is therefore particularly necessary in this case.

In *United States v. Bolinger*, 940 F.2d 478 (9th Cir. 1991), the court upheld a condition of supervised release prohibiting the defendant's participation or membership in motorcycle clubs. The court, considering the defendant's plea of guilty to firearms possession and drug dealing, concluded that this was a valid restriction on the defendant's freedom of association.

> The sentencing judge could properly have concluded that Bolinger was more likely to relapse into crime if he returned to his prior associations. Probation conditions may seek to prevent reversion into a former crime-inducing lifestyle by barring contact with old haunts and associates, even though the activities may be legal. *Bolinger*, 940 F.2d at 480 (*citing Malone v.*

United States, 502 F.2d 554, 556-57 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975)).

The Defendant entered into a very favorable plea agreement with the government, and was sentenced at the mid-point of the applicable guideline range of six to twelve months. He has greatly profited from a system that balances the defendant's rehabilitation with the need to protect the public. Now, through semantical manipulations, the Defendant wishes to escape the minor requirements of supervision. This, the Court will not allow.

II. "VARIANCE" BETWEEN THE WRITTEN AND ORAL SENTENCING PRONOUNCEMENTS

The written conditions listed in Probation Form 7A and the Judgment and Commitment Order fully conform with the Court's oral imposition of a sentence of three years supervised release. Rather than being a "variance," as alleged by the Defendant, the detailed list of conditions is merely a means of setting forth the procedures and administration of supervision, and explaining to the Defendant exactly what is expected of him while on supervised release.

A.STATUTORY AUTHORITY

This Court relies on 18 U.S.C. § 3583 (f) "Written Statement of Conditions" which states:

> The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

This section provides sound authority for the procedure followed by courts throughout the United States. The statute presumes that the sentencing court will *not* read at sentencing each of the standard conditions imposed on a defendant, and will leave the administration of supervision to a duly authorized probation officer. Thus, it can not be argued that the terms of supervised release provided to the Defendant by his probation officer constitute a variance with the oral sentence imposed.

B. HARMLESS ERROR EVEN IF "VARIANCE" EXISTS

Even a court's total failure to notify a defendant of a term of supervised release, state its length or explain its effect may constitute harmless error, if error at all. If the total term of imprisonment and supervised release is less than the potential statutory maximum for the offense, then there is no prejudice to the defendant's substantive rights. *See, e.g., McCleese v. United States*, 75 F.3d 1174 (7th Cir. 1996); *United States v. Raineri*, 42 F.3d 36 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 2286 (1995); *United States v. Good*, 25 F.3d 218 (4th Cir. 1994); *United States v. Gracia*, 983 F.2d 625 (5th Cir. 1993); *United States v. Barry*, 895 F.2d 702 (10th Cir.), *cert. denied*, 496 U.S. 939 (1990); *Miller v. United States*, 826 F. Supp. 636 (N.D.N.Y. 1993).

Courts reason that the defendant's knowledge of the possibility, nature, or length of supervised release would not have affected the defendant's decision to plead guilty. The same analysis applies in the instant case, where the defendant is only claiming that he did not know the specific conditions governing his term of supervised release.

The Defendant pled guilty to a crime that exposed him to a maximum term of imprisonment of five years and three years supervised release. He received a sentence of nine months imprisonment and three years supervised release. It can not be

reasonably presumed that more information on the details of administration of supervision would have affected the Defendant's decision to plead guilty. It is highly unlikely that the Defendant would have risked five years of prison in lieu of complying for three years with the very minor inconveniences caused by the conditions. This analysis is further supported by the fact that had the Defendant served a five year prison term, he *still* would have been bound by the very same conditions.

Although the Court concludes that no error occurred in its failure to recite the standard conditions of supervised release at sentencing, any possible error resulting from this omission was clearly harmless.

III. DEFENDANT'S UNDERSTANDING OF SUPERVISED RELEASE

The Defendant's argument presupposes that at the time of sentencing the Defendant had no reason to believe that supervised release would require him to alter his activities and/or behavior in any way. While the Defendant sharply contests the government's argument of "implied" conditions of supervision, the Court concludes that the Defendant, represented by experienced counsel, surely contemplated some obligations on his part.

Both the Court and the government informed the Defendant that he was subject to a term of supervised release, and of the consequences of violating the conditions of that term. The phrase "supervised release" was used in the plea argument, during plea allocution, and at sentencing, and the Defendant was given numerous opportunities to question or comment if he was unclear about what precisely supervision might entail. It further weights against the Defendant that he repeatedly remained silent when informed of the term of supervised release. The Court may

interpret that silence as the Defendant's knowledge and awareness of the general nature of supervised release.

In *Miller v. United States*, 826 F. Supp. 636 (N.D.N.Y. 1993)[4], the defendant challenged his sentence on the ground that the court failed to notify the defendant at plea colloquy of the possibility of a term of supervised release. The Court denied the defendant's motion concluding,

> Miller and his counsel were given the opportunity to question the supervised release period mentioned in the presentence report during sentencing but failed to comment on it. This silence must be taken as tacit acceptance or at least an acknowledgment of the supervised release portion of the sentence. *Miller*, 826 F. Supp. at 638.

Crea claims that a constitutional violation occurred when in fact, the very most that could be alleged is a formal or "technical" error. Such errors, however, "do not become constitutional if the defendant was given the opportunity to bring these issues before the court." *Id. (citing Lucas v. United States*, 963 F.2d 8, 14-15 (2d Cir.), *cert. denied*, 113 S. Ct. 270 (1992)).

The defendant's claim that the Court's omission amounts to a constitutional violation is without merit.

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[4] *Miller* is also instructive on the impropriety of frivolous collateral attacks based on technicalities. As in this case, the defendant in *Miller* did not claim that he would not have pled guilty had he known of the term of supervised release. *Miller*, 826 F. Supp. at 637 (*citing Lucas v. United States*, 963 F.2d 8, 13 (2d Cir.), *cert. denied*, 113 S. Ct. 270 (1992). *See also infra* Part II.B.

IV. "SPECIAL" and "STANDARD" CONDITIONS

The Defendant argues that the conditions of supervised release listed in Probation Form 7A are "special conditions." Special conditions can only be imposed if the court gives the reasons for the conditions on the record at sentencing, and if the conditions are reasonably calculated to advance the goals of supervised release as set forth 18 U.S.C. § 3553(a) (2). *See infra* note 3. The Defendant claims that the Court provided no reasons for imposing the conditions at the time of sentencing, thus rendering the conditions invalid.

The Defendant ignores the headings in the United States Sentencing Guidelines and relies heavily on one case to bolster his creative, but fatally-flawed argument that there are no "standard conditions" of supervised release. Def. Reply at 2.

The Court observes that the heading of U.S.S.G. § 5B1.4(a) states "The following 'standard' conditions (1-13) are generally recommended for both probation and supervised release." The heading of U.S.S.G. § 5B1.4(b) states "The following 'special' conditions of probation and supervised release (14-24) are either recommended or required by law under the circumstances described, or may be appropriate in a particular case." Although it appears quite clear from these headings that there are "special" and "standard" conditions, the defendant argues that the Second Circuit Court of Appeals has ruled that the Sentencing Reform Act of 1986 eliminated the standard conditions.

In *United States v. Smith*, 982 F.2d 757 (2d Cir. 1992), the defendant challenged the condition that he meet with his probation officer regularly. Smith argued, as does Crea, that this condition was never imposed by the sentencing court because the court failed to make an explicit determination that the condition met the sentencing requirements of 18 U.S.C. § 3583(d).

Smith states;

> [T]he Sentencing Reform Act eliminated standard conditions, replacing them with mandatory and discretionary conditions. Regular meetings with a probation officer are not a mandatory condition of supervised release under 18 U.S.C. § 3583(d). However, § 3583(d) indicates that the court may impose additional, discretionary conditions, including those listed in the probation statute at 18 U.S.C. § 3563(b).[5] *Smith*, 982 F.2d at 764.

This statement regarding the "elimination" of standard conditions is puzzling, considering that the *Smith* court itself refers to the conditions as "standard."

> While a court must conduct the analysis this section requires, it need not analyze the factors on the record for each condition. The challenged condition [visiting a probation officer', like most of the *standard conditions* imposed, is a *basic administrative requirement* essential to the functioning of the supervised release system. *Id.* (emphasis added) (citation omitted).

The Court concludes that Smith is bound by the conditions, and that the sentencing court did *not* justify their imposition on the record at sentencing. Although *Smith* held that the conditions listed at U.S.S.G. § 5B1.4(a) are "discretionary," the holding also indicates that these conditions are not "special" conditions that would require the court to justify their imposition.

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[5] This Statute includes additional conditions that are not listed in Probation Form 7A and U.S.S.G. § 5B1.4(a), as well as conditions that clearly have more of an impact on liberty interests–for example residential and occupational restrictions and electronic monitoring.

United States v. Williams, 65 F.3d 301 (2d Cir. 1995) further supports the idea of "standard conditions" and the method of imposition utilized by this Court. The Court of Appeals notes that the district court did not impose any "special conditions," and that the defendant was subject only to "standard conditions of supervised release." *Id.* at 308. The Second Circuit then cites U.S.S.G. § 5B1.4(a), which lists the conditions challenged by Crea. *Id.*

While several cases involve challenges to conditions of supervised release, only *Smith* challenges one of the standard conditions. Other cases reveal examples of "special conditions" imposing constraints on liberties far beyond those resulting from the standard conditions. *See, e.g., United States v. Ismoila*, 100 F. 3d 380 (5th Cir. 1996) (defendant convicted of wire fraud and ordered to pay restitution must provide access to any financial information requested by probation officer); *United States v. Edgin*, 92 F.3d 1044 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 714 (1997) (defendant who pled guilty to making harassing calls to son's mother prohibited contact with son; remanded to district court to make findings regarding necessity because condition had severe impact on liberty interest); *United States v. Phaneuf*, 91 F.3d 255 (1st Cir. 1996) (defendant convicted of credit card fraud prohibited from incurring extension of credit without permission from probation department); *United States v. Peppe*, 80 F.3d 19 (1st Cir. 1996) (defendant convicted of making extortionate extensions of credit required to have any new credit charges or credit lines reviewed by probation officer); *United States v. Doe*, 79 F.3d 1309 (2d Cir. 1996) (defendant who pled guilty to filing false tax returns required to notify tax preparation clients of conviction; remanded to district court to provide justification); *United States v. Johnson*, 998 F.2d 696 (9th Cir. 1993) (defendant ordered to abstain from alcohol because of personal and familial history of substance abuse, and proceeds of crimes used to buy alcohol); *United States v. Mills*, 959 F.2d 516 (5th Cir. 1992) (defendant convicted of altering odometers prohibited

from participating in car business); *United States v. Sharp*, 931 F.2d 1310 (8th Cir. 1991) (defendant pled guilty to conspiracy to distribute narcotics subject to warrantless searches for alcohol or drugs).

A brief perusal of the aforementioned cases illustrates what is meant by the term "special conditions." None of these conditions are included in U.S.S.G. § 5B1.4(a), but several are specific applications of the conditions set forth in U.S.S.G. § 5B1.4(b). As compared to the conditions listed above, the conditions challenged by the Defendant impose few restraints on individual liberties.

V. AUTHORITY TO MODIFY CONDITIONS

The Defendant argues that the conditions were not properly imposed on the Defendant, and that the Court can not amend the Defendant's sentence to include these conditions. Although the conditions were properly imposed, the Court will nonetheless address the issue of modification of conditions of supervised release.

The Defendant relies on *United States v. Strozier*, 940 F.2d 985, 987 (6th Cir. 1991), which held that a court may amend a sentence *sua sponte* only within the time for appeal, and only to conform the sentence to the mandatory provisions of the Sentencing Guidelines.[6] A different statutory provision, however, applies to modification of a term of supervised release.

18 U.S.C. § 3583(e) (2) states that after consideration of the relevant sentencing factors described in 18 U.S.C. § 3553 *et seq.*,

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[6] *Strozier* addressed the sentencing court's attempt to add a term of supervised release when none had been imposed initially; not the modification of conditions of supervised release. *Strozier*, 940 F.2d at 986-87 (6th Cir. 1991).

the court may "modify, reduce, or enlarge the conditions of supervised release, *at any time prior to the expiration or termination of the term of supervised release.*" (emphasis added).[7] *See, e.g., United States v. Berardini*, 1997 WL 209693, at *4 (2d Cir. Apr. 30, 1997); *United States v. Morales*, 45 F.3d 693, 696 (2d Cir. 1995); *United States v. Navarro-Espinosa*, 30 F.3d 1169, 1171 (9th Cir. 1994).[8]

It is therefore well within the authority of this court to *sua sponte* impose conditions upon the Defendant at any time within three years of his release on November 7, 1996. Even if the conditions in Probation Form 7A constituted a "variance" with the oral sentence, the Court could modify the conditions to impose not only the standard conditions, but any other conditions it considered necessary to accomplish sentencing goals with regard to this Defendant. *See infra* note 3.

The Defendant's argument to the contrary is without merit.

VI. BREACH OF PLEA AGREEMENT

The Defendant's final argument, raised in his reply to the government's response, is that the Government breached the terms of the plea agreement by responding to the Defendant's motion. The Defendant correctly notes that the government agreed not to take any position regarding the Defendant's sentence and then asserts that the government's response to the Defendant's motion constitutes a breach of this term of the plea

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[7] Federal Rule of Criminal Procedure 32.1(b) requires the court to conduct a hearing with the defendant assisted by counsel.

[8] Furthermore, the sentencing court can modify conditions *regardless* of whether the defendant has violated the existing conditions. *United States v. Lowenstein*, 108 F.3d 80 (6th Cir. 1997).

agreement. This argument is frivolous and warrants little consideration whatsoever from this Court.

The plain language of the plea agreement is that the government can take no position regarding *where within the appropriate Sentencing Guideline range the Defendant should be sentenced.* It does not obligate the government to remain silent when presented with challenges regarding issues other than the length of the Defendant's imprisonment. The Defendant's present motion clearly concerns a matter exceeding this provision of the plea agreement. The government's response has been duly considered by the Court and will not be stricken. The Defendant's request for sanctions is denied.

CONCLUSION

The Defendant's motion to resettle the judgment to delete the standard conditions of supervised release is denied. The Defendant is required to comply with the conditions set forth in Probation Form 7A and the Judgment and Commitment Order for the remainder of his term of supervised release. SO ORDERED.

Sterling Johnson Jr.
U.S.D.J.

Dated: June 26, 1997
Brooklyn, New York

Appendix C - Summary Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing En Banc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Court House
40 Foley Square, New York 10007

No. 97-1404

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of April, one thousand nine hundred and ninety.

USA

v.

Crea

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellate STEVEN CREA.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: s/Beth J. Meador
Beth J. Meador,
Administrative Attorney

Filed April 7, 1999
United States Court of Appeals
Second Circuit

Appendix D - Judgment of Conviction

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
-vs-
STEVEN CREA,

Defendant

JUDGEMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

CASE NUMBER: 93 CR 0506(SJ)

Paul Victor, Esq.
17 Battery Place
New York, NY 10004
Defendant's Attorney & Address

THE DEFENDANT:
x pleaded guilty to count ten of the superseding indictment.
__ was found guilty on count[s] after a plea of not guilty.

Accordingly, the defendant is ADJUDGED guilty of such count(s), which involve the following offenses:

Title & Section	Nature & Offense	Count Number(s)
18 U.S.C. 371	Conspiracy to Defraud THE U.S.	s10

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_ The defendant has been found not guilty on count[s] and is discharged as to such count[s].

x All open counts are dismissed on the motion of the United States.

x It is ORDERED that the defendant shall pay to the United States a special assessment of $50.00 which shall be due immediately.

It is further ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessment imposed by this Judgment are fully paid.

Defendant's Soc. Sec. #122-36-6784

Date of Imposition of Sentence December 8, 1995

Defendant's Date of Birth 07/18/47

s/Sterling Johnson Jr.
STERLING JOHNSON, JR. U.S.D.J.

Defendant's Address:

29 Witherbee Avenue

Pelham Manor, NY 10803

December 8, 1995
Date

A TRUE COPY TEST
Dated: 12/08/95
ROBERT C. HEINEMANN
CLERK

By: s/August Marziliano
AUGUST MARZILIANO
DEPUTY CLERK

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of nine (9) months.

Execution of sentence stayed until 1/22/96.

xx The Court makes the following recommendation to the Bureau of Prisons:

Northeast designation.

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district,

__ at_____ on _____.

__ as notified by the Marshal.

x The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

xx before 2:00 P.M. on 1/22/96.

___ as notified by the United States Marshal.

___ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on_____ to_____

at_____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By_____

DEPUTY MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

Special condition[s] of supervised released:

1 The defendant is ORDERED to pay restitution in the amount of $22,230.00.
Payments to be made to the Internal Revenue Service on a schedule to be determined by Probation.

__ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) The defendant shall not leave the judicial district without the permission of the court or probation officer;
3) The defendant shall report to the probation officer as directed by the court of probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) The defendant shall support his or her dependents and meet other family responsibilities;
6) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) The defendant shall notify the probation officer within seventy-two hours of being arrested and questioned by a law enforcement officer;

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

STATEMENT OF REASONS

__x__ The court adopts the factual findings and guideline application in the presentence report.

____ The court adopts the factual findings and guideline application in the presentence report except *[see attachment, if necessary]*

GUIDELINE RANGE DETERMINED BY THE COURT:

Total Offense Level: 10

Criminal History Category: I

Imprisonment Range: 6 to 12

Supervised Release Range: 2 to 3

Fine Range: $2,000.00 to $20,000.00

__X__ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $22,230.00

__ Full restitution is not ordered for the following reason[s]:

__XX__ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

____ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason[s]:

____ The sentence departs from the guideline range

_____ Upon motion of the government, as a result of defendant's substantial assistance.

_____ For the following reason[s]:

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Appendix E - Transcript of Pre-Sentencing Proceeding held August 18, 1995

(1) UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____x

UNITED STATES OF AMERICA

CR-93-506

-against-

United States Courthouse
Brooklyn, New York

STEVEN CREA,

Defendant. August 18, 1995
2:30 o'clock p.m.

_____x

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STERLING JOHNSON, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ZACHARY W. CARTER
United States Attorney
BY: BRIDGET ROHDE
F. JOSIAH LEICHT
Assistant United States Attorneys
225 Cadman Plaza East
Brooklyn, New York 11201

For the Defendant: PAUL A. VICTOR, EST.

Court Reporter: Holly Driscoll
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by CAT.

Holly Driscoll, RPR - Official Court Reporter

(2) THE CLERK: United States of America versus Steven Crea, Dominick Truscello, Manny Garagolo and Steven Long.

THE COURT: Do you know what it is going to be?

MS. ROHDE: It is my understanding it is going to be four guilty pleas, Your Honor.

THE COURT: Good afternoon.

Are we ready?

MR. VICTOR: Will Your Honor go through a whole new pedigree?

THE COURT: I'm going to do it one at a time too.

MR. VICTOR: Yes.

THE COURT: Call the case of U.S. versus Crea.

THE CLERK: United States of America versus Steven Crea.

MS. ROHDE: Good afternoon, Your Honor, Bridget Rohde for the government.

MR. LEIGHT: Josh Leicht for the government.

MR. VICTOR: Paul A. Victor for the defendant Steven Crea.

Your Honor, I'd like to state for the record –

THE COURT: Wait.

Swear in the defendant.

(Defendant sworn by the clerk.)

MR. VICTOR: I'd like to state before we proceed that (3) the defendant is going to go forward with the plea as per the plea agreement. The allocution will be identical to the allocution which was found acceptable yesterday but I understand that the government has a statement to make and if the government makes the statement we will go forward.

MS. RHODE: In conjunction with pleading to Court Ten Mr. Crea obviously will make an allocution and the government acknowledges that the defendant in taking this plea does not

admit any of the allegations set forth in the indictment except those specifically contained in his allocution.

THE COURT: All right. Did you swear the defendant in, Augie?

THE CLERK: Yes, Your Honor, I did.

THE COURT: I say to you, Mr. Crea, do you understand that you are now under oath and if you answer any of my questions falsely, your answers may be later used against you in another prosecution for perjury or making a false statement; do you understand that?

THE DEFENDANT: I do.

THE COURT: What is your full name?

THE DEFENDANT: Steven Louis Crea.

THE COURT: How old are you?

THE DEFENDANT: 48.

THE COURT: How much education have you had?

THE DEFENDANT: Tenth grade.

(4) THE COURT: What school?

THE DEFENDANT: Roosevelt High School.

THE COURT: That's Roosevelt in the Bronx?

THE DEFENDANT: Yes.

THE COURT: Do you understand what's happening now, why you are here?

THE DEFENDANT: Yes.

THE COURT: Have you ever been treated for any mental illness or addiction to narcotic drugs of any kind?

THE DEFENDANT: No.

THE COURT: Are you currently under the influence of any drugs, medication, alcoholic beverage?

THE DEFENDANT: No.

THE COURT: Have you received a copy of the indictment or the charges against you?

THE DEFENDANT: Yes.

THE COURT: Have you discussed it with your lawyer Mr. Victor who is standing next to you?

THE DEFENDANT: Yes.

THE COURT: Are you fully satisfied with the advice, representation and counsel he has given you with respect to these charges?

THE DEFENDANT: Yes.

THE COURT: There is a plea agreement in your case, it has been marked Court's Exhibit Number One and for the (5) record Court's Exhibit Number One has been executed by the defendant, by his lawyer and by the government.

I ask you, Mr. Crea, are there any promises in Court's Exhibit Number One – any promises other than what's in Court's Exhibit Number One that has induced you to plead guilty?

THE DEFENDANT: No.

THE COURT: Have any threats been made to induce you to plead guilty?

THE DEFENDANT: No.

THE COURT: Now, you are an American citizen, is that correct?

THE DEFENDANT: Correct.

THE COURT: Do you understand that if your plea of guilty to this charge is accepted, it is a felony punishable by more than one year in jail and if your plea is accepted you will be adjudged guilty of that offense and such adjudication may deprive you of valuable civil rights such as the right to vote, the right to hold public office, the right to serve on a jury and the right to possess a firearm of any kind; do you understand that?

THE DEFENDANT: Yes.

THE COURT: According to Court's Exhibit Number One you are pleading guilty to Count Ten; is that correct?

THE DEFENDANT: Yes.

(6) THE COURT: Now –

THE DEFENDANT: Part of.

THE COURT: You are pleading guilty to Count Ten?

MR. VICTOR: Yes, in accordance with the agreement with the government and the statement made.

THE COURT: I understand that. I am talking to the defendant now.

MR. VICTOR: Yes.

THE COURT: Now, according to the plea agreement the maximum amount of time that you are exposed to is five years; do you understand that?

THE DEFENDANT: Yes.

THE COURT: And after any prison term you will be placed on supervised release the maximum being three years; do you understand that?

THE DEFENDANT: Yes.

THE COURT: And if you violate the terms of your supervision notwithstanding any time you've served in prison you can be returned to prison for as long as two years; do you understand that?

THE DEFENDANT: Yes.

THE COURT: There is a possibility of a $250,000 fine; do you understand that?

THE DEFENDANT: Yes.

THE COURT: There is a possibility you might be made (7) to give restitution in the tune of $22,230; do you understand that?

THE DEFENDANT: Yes.

THE COURT: There is a $50 special assessment; do you understand that?

THE DEFENDANT: Yes.

THE COURT: According to the sentencing guidelines and this charge falls within the sentencing guidelines, you are exposed to a sentence of anywhere between six to twelve months; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, you do not have to plead guilty. You can plead not guilty and if you plead not guilty you would be entitled to a speedy and public trial and at that trial the government would have to bring witnesses in to testify against you; do you understand that?

THE DEFENDANT: Yes.

THE COURT: You yourself wouldn't have to do anything at all because the government bears the burden of proof. However,

when the witnesses did come in and testify you'd have the right to cross-examine these witness. You can bring witnesses in to testify for you; do you understand that?

THE DEFENDANT: Yes.

THE COURT: You can take the witness stand and you (8) can testify in you own behalf; do you understand that?

THE DEFENDANT: Yes.

THE COURT: However, if the plea is accepted there will be no trial; do you understand that?

THE DEFENDANT: Yes.

THE COURT: And all the rights I have explained to you will have been waived; do you understand that?

THE DEFENDANT: Yes.

THE COURT: I ask the government if you were to go to trial in this matter with this defendant what would be the proof against the defendant?

MS. ROHDE: Your Honor, we would prove that upon learning that other crime families beside the Luchese Family were extorting money from DeLuxe, a company Crea believed to be with him, Crea used his influence to obtain an agreement that he would get ten percent of the laundered proceeds from the extortion and that the Luchese Family would get one third of the laundered proceeds.

The mechanics by which this was accomplished was as follows:

Garafolo companies inflated their contracts with DeLuxe. Then the invoices were correspondingly inflated as were the checks. The laundered extortion proceeds were then distributed on to the various organized crime families.

Tax returns of the recipient of the proceeds as well (9) as the conduit companies were not accurate with respect to these transactions thus impeding the IRS in the ascertainment and collection of income tax.

THE COURT: Where did this occur?

MS. ROHDE: Your Honor, the conspiracy spanned the Eastern District and it also occurred in the Bronx. Acts occurred in Brooklyn with respect to this particular defendant.

THE COURT: When did it occur?

MS. ROHDE: And the period during which Mr. Crea was involved, if you'll bear with me just a minute, Your Honor, it was '90 through December of '91. I just wanted to get the start date in 1990.

THE COURT: I want the date to conform to the charge.

I ask you, Mr. Crea, tell me in your own words what is it that you say you did wrong, what are you attempting to plead guilty to?

THE DEFENDANT: In or about 1990 or 1991 in the Eastern District of New York I agreed to defraud the United States by impairing – impeding the Department of Treasury in the computation of taxes with regard to the DeLuxe Homes of Pennsylvania, Inc. and in doing so I did not deal with any persons known to me to be government agents or informants. I deny each and every allegation of this indictment.

(10) THE COURT: Is there anything else you wish me to ask him?

MS. ROHDE: No, Your Honor.

THE COURT: Do you see any reason why this plea should not be accepted, Mr. Victor?

MR. VICTOR: No, Your Honor.

THE COURT: With respect to Count Ten, Mr. Crea, I ask you how do you plead, guilty or not guilty?

THE DEFENDANT: Part of Count Ten guilty.

THE COURT: No, no, no.

I ask you, Mr. Crea, how do you plead?

MR. VICTOR: Excuse me.

(Pause.)

THE DEFENDANT: I plead to Count Ten as I have stated in my allocution.

THE COURT: Guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: It is the finding of the Court in the case U. S. versus Steven Crea that the defendant is fully competent and capable of entering an informed plea, that his plea of guilty is knowing, it is voluntary and supported by independent bases in fact containing each of the essential elements of the offense.

His plea, therefore, is accepted and he is now adjudged guilty of that offense.

(11) Date, Augie.

THE CLERK: October 27, 9:30.

THE COURT: You will be sentenced on October 27 or someday thereafter.

Okay. Next case.

(End of proceedings.)

Appendix F — Transcript of Sentencing held December 8, 1995

(1) UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

-against-

STEVEN CREA,

Defendant.

- X

CR 93-506
United States Courthouse
Brooklyn, New York

December 8, 1995
10:30 o'clock a.m.

TRANSCRIPT OF SENTENCE
BEFORE THE HONORABLE STERLING JOHNSON, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ZACHARY W. CARTER
United States Attorney
BY: BRIDGET RHODE and
JOSH LEICHT
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

For the Defendant: PAUL VICTOR, ESQ.

Court Reporter: Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by CAT.

Henry Shapiro - Official Court Reporter

(2) THE CLERK: United States versus Steven Crea.

MS. RHODE: Bridget Rhode.

MR. VICTOR: Paul A. Victor.

THE COURT: Have the defendant step up.

Counsel, have you read and discussed the pre-sentence report with the defendant?

MR. VICTOR: Yes, your Honor.

THE COURT: Are you ready for sentencing?

MR. VICTOR: Yes, your Honor. With one exception, we only received the government's response to our pre-sentence memoranda yesterday and we did the best we can in submitting a reply to that response, only this morning. I don't know whether your Honor had a chance to read it. We're asking if your Honor can consider it, a short adjournment so that we can more fully document the statements, which we made in the reply memorandum. If your Honor is prepared to go forward, however —

THE COURT: The application is denied. I'm prepared to go forward.

MS. RHODE: We received Mr. Victor's paperwork on Tuesday, which is why we responded yesterday.

MR. VICTOR: Your Honor, we have submitted a full presentence memorandum as well as a reply, in which we want to make it abundantly clear, although in the memorandum we discuss role in the offense, we're not seeking an adjustment (3) in the calculation nor downward departure.

We discuss those aspects only in the context of the appropriate sentence, which this Court can impose within the guideline range negotiated in the pre-agreement.

As your Honor's knows, there was arm's length plea negotiations with the government, we entered into a plea agreement that

resulted in a plea by this defendant to a count of defrauding the government in computation of taxes.

It resulted, because he's a category one offender, first time, a guideline of ten, which results in a guideline range of six months to twelve months. But under that guideline there are a whole hoist and menu of options available to the Court.

Our submission was to support our position that your Honor should impose a sentence at the lower end of the guideline range and to impose an option, which results in a probation of one year, with home confinement and detention of six months.

Now, with regard to the role of the offense, the government has put in a response, which we submit, your Honor, is not only specious, not only not based in fact, not documented as we have attempted to do in our submission to you.

We have made reference to various portions of the discovery material, which had been provided to us and includes (4) affidavits of FBI agents, wiretap conversations, and Brady material, which was belatedly presented to co-defendants, after we plead guilty and it's clear from those documents, that there was in fact no extortion of the company Deluxe.

I could say that from a reading of those documents, the allegation is more than specious, and even the theory of the government on how Mr. Crea played a role in that alleged extortion is inconsistent. They allege that Mr. Crea was interjected in the final phase of a Deluxe project, because he considered Deluxe to be quote with him and that an agreement was ultimately structured whereby Deluxe would go back to him.

It's clear, your Honor, and I don't think the government would refute that Deluxe did jobs in the Bronx prior to the three jobs, which are the subject of this indictment, and they did it without any allegations from anybody of any wrongdoing and extortion free and Deluxe after these three jobs did jobs both in the Bronx and Yonkers, and there are no allegations of wrongdoing and Deluxe performed those jobs extortion free.

The compelling conclusion from the circumstances would be if you want to separate the government's version that Deluxe was

and became again with Mr. Crea, when it was with Mr. Crea, it performed its job extortion free.

All of the other activities of other persons that may (5) equate to extortion — and we deny those — that it does, were done well prior to any involvement of Mr. Crea in any of the transactions here and, I think, the government in its submission to you has confused certain issues.

It's clear, and we document it again, that Deluxe was not in fear of anyone. They actively sought the assistance of one of the co-defendants here, they hired him to perform the function, they paid him for it. Used to be a trouble shooter on collections and union problems. And they benefited substantially.

Every single one of these jobs was brought in at the cost estimate made by governmental agencies. Did not lose any money. Made its full complement of profits and even more, since it was able to deal with itself in buying equipment from its mother company in New Jersey. He was not a victim in any way whatever.

Was an active participant in all of the activities, but again I would say, your Honor, and even the probation report indicates that whatever — however you want to characterize the activities of other people in dealing with Deluxe, Mr. Crea was not involved in them. His sole involvement came much later and only because of a dispute of the right of subcontractors to work.

I would ask your Honor if your Honor has any doubt about any of the items, we can again supplement our (6) presentence report with documents from the government's records, not from ours.

More importantly, your Honor, we asking for your Honor to consider what the proper sentence should be. The government, we submit, its response memorandum has violated its agreement. We're making an argument as to a proper and appropriate sentence within the guideline range, which we have set forth. The government in its plea agreement with us, and I quote, agreed to take no position concerning where within the appropriate sentencing guideline range determined by the Court, where

the sentence should fall. And yet they are arguing now against a probationary sentence, which clearly is an appropriate sentence within the guideline range set forth.

We quote the section of the guidelines that allow a probtionary sentence with home confinement and other options available to the Court, including custodial as well as noncustodial. A noncustodial option, a probationary term with three months home confinement, which is one that your Honor has. There are many, as we have set forth within our pre-sentence report.

Your Honor, there are many reasons why this probationary sentence should be imposed. Number one, I have already discussed his role in the offense was minor, if not minimal, and we're talking about the offense to which he has pled. There is absolutely no evidence in the record that he (7) took any action, which even could encourage persons, other than co-conspirators, to defraud the government. There is absolutely nothing in the record, and we set forth all the things that Mr. Crea is not charged with and did not do and, of course, they are ignored by the government.

He did not benefit in any way. He did not fail to file his taxes, to pay his taxes, he did not meet with any of the Deluxe people, he did not do a whole menu of things, he had a very, very minor if not minimal role in the offense.

But coupled with that, your Honor, we have extraordinary circumstances which your Honor should take into consideration. His health. He has a very debilitating periodontal condition which has been under treatment and has been ongoing for about a year. It needs ongoing treatment. And if he does not get that treatment, could result in complete destruction of his jaw. Infection could set in, could effect his heart, and it's all documented in the medical report that we submitted.

In addition to that you have received letters from his family. They are most compelling. It demonstrates that Mr. Crea is not only a loving husband, but a model husband, a model father, is the model grandfather. He's the sole support of his family

including his mother — widowed mother. His wife of twenty-eight years, has been suffering for several years from a Hodgkin's disease, a lymphoma, which is spelled out in (8) the letter of her daughter, Betty Crea, who is one of the co-authors. It's also mentioned in the pre-sentence report. It's a very serious condition. She was given a six months life expectancy when first diagnosed and it was true the extraordinary efforts of Mr. Crea, his encouragement, his faith and support that she was able to survive all of these years and here present in court with us with the entire family. And stress has been one of the causes for this Hodgkin's disease, that was the decision made by the doctor and, of course, your Honor, any period of incarceration — any departure of the husband is going to add to that stress and may also add to her condition.

So we have health reasons, family reasons, we have minor role in the offense and we also have a letter — I could have inundated this Court with letters from community people. It was only through Mr. Crea's intervention he asked me not to do that. He did not want to bring other people in. We do have one letter corroborating that, that is from Father Napolitano who has known Mr. Crea for many years. Not only is Mr. Crea a family man, a community activist who has taken part not only in church charities, community affairs, but has helped the underprivileged.

For all these reason I would ask that the lower end of the guideline range be considered.

THE COURT: Does the defendant wish to be heard.

(9) THE DEFENDANT: No, your Honor.

THE COURT: The government want to be heard?

MS. RHODE: I would note that in response to the allegation that we violated our agreement, we are not taking a position where within the guideline range. We've simply responded to the point with respect to role, for conduct that tended to cause others to impair the IRS and we would comment on a downward departure motion that was made. There is no downward departure motion, we simply leave the decision to your Honor.

THE COURT: I'm going to sentence the defendant to the custody to the Attorney General for period of nine months, that the defendant make restitution in the amount of twenty-two thousand two hundred and thirty dollars, the terms of that restitution to be worked out with the Probation Department, and a $50.00 special assessment.

THE COURT: Any outstanding counts?

MS. RHODE: The underlying indictment we would move to dismiss it.

THE COURT: Supervised release for a period of three years.

MR. VICTOR: Your Honor, I would respectfully request that the defendant be permitted to surrender to the institution, and that your Honor recommend an institution in the Northeast and briefly that the nine months be at the (10) Allanwood Camp.

THE COURT: I'm going to first of all grant your application that he surrender to the institution.

THE CLERK: January 19th.

THE COURT: January 19th. I will recommended a facility somewhere on the Eastcoast. I cannot and will not recommend any specific institution.

MR. VICTOR: Could we make that Monday instead of Friday, because I'm told the processing doesn't take place over the weekend, and he will be in a holding pattern. If we do it on Monday it would be facility.

THE CLERK: The 22nd.

The 22nd on the other defendant.

* * *

Appendix G - Affidavit of Paul A. Victor in Support of Motion Pursuant to Rule 36.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____x

UNITED STATES OF AMERICA

CASE NUMBER:
93 CR 0506 (SJ)

-against-

STEVEN CREA,

Defendant. AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION PURSUANT TO FED. R. CR. PROC. RULE 36

_____x

State of New York }
} ss:
County of New York }

PAUL A. VICTOR, being duly sworn, says:

1. I am a member of the firm of Dublirer, Haydon, Straci & Victor, attorneys for the defendant Steven Crea in the above captioned action and I make this affidavit in support of defendant's motion pursuant to Rule 36 of the Federal Rules of Criminal Procedure to ressettle the Judgement herein.

2. In 1993, defendant was indicted by a Grand Jury in the Eastern District of New York.

3. In or about August, 1995, Defendant entered into an agreement with the U. S. Attorney for the Eastern District of New York to plead guilty to one count of agreeing to impede the United States Department of Treasury in the computation of

income taxes with respect to DeLuxe Home of Pennsylvania, Inc., in violation of 18 U.S.C. §371. (Exhibit A)

4. Pursuant to the plea agreement it was understood that, under the 1991 Sentencing Guidelines, based on an estimated offense level of 10, defendant would be subject to a range of imprisonment from 6 to 12 months (Exhibit A at 2) and a term of supervised released to follow any term of imprisonment. (Exhibit A at 1)

5. In addition, pursuant to the said Plea Agreement, it was understood that defendant would be subject to a maximum fine of $250,000, would be required to make restitution in the amount of $22,230 and would be required to pay a $50 special assessment. (Exhibit A at 1-2). With exception of the conditions set forth above, the Agreement specified that no other penalties would be imposed upon defendant. (Exhibit A at 2)

6. On August 18, 1996, the Court reiterated the terms of the Plea Agreement and advised the defendant that after any prison term he would be placed on supervised release for a maximum period of three years (Exhibit B at 5-7). On August 18, 1996, in reliance on the terms of the Plea Agreement and the statements made by the Court on that date, defendant pled guilty to that part of Count Ten which charged that

> in or about 1990 or 1991, in the Eastern District of New York [he] agreed to defraud the United States by . . . impeding the Department of Treasury in the computation of taxes with regard to the DeLuxe Homes of Pennsylvania, Inc. . . .

Exhibit B at 9.

7. The government explicitly acknowledged that, in taking this plea, defendant did not admit to any of the allegations set forth in the indictment with the exception of those specifically contained in his allocution. (Exhibit B at 3).

8. On December 8, 1996, defendant was sentenced by this Court to a term of 9 months imprisonment. He was further required to make restitution in the amount of twenty-two thousand two hundred and thirty dollars, the terms of said

restitution to be worked out with the Probation Department. In addition the Court imposed supervised release for a period of three years. (Exhibit C at 9). No conditions of supervised release were imposed by the Court. All other counts of the Indictment were dismissed.

9. In reliance on the sentence imposed by the Court on December 8, 1996, it was understood that the sentence included a term of imprisonment for 9 months in a federal correctional facility; that defendant was required to make restitution in the amount of $22,230.00 and that following his release from imprisonment he would be subject to three years of supervised release. Insofar as none of the discretionary or special conditions of supervised release were imposed by the court, defendant reasonably understood that the only conditions of supervised release were the mandatory conditions as set forth in U.S.S.G.§5B1.3 Based on the proceedings of December 8, it was further understood that, other than the terms and conditions set forth above, no other liberty interest would be impaired as a result of defendant's plea and subsequent sentence. There were no further proceedings in connection with the sentence.

10. Defendant was subsequently remanded to the Federal Correctional Facility at Loretto, Pennsylvania where he served a nine month term of imprisonment.

11. Mr. Crea was released from custody on November 7, 1996. Thereafter, he initially visited the Department of Probation at 75 Clinton Street in Brooklyn, New York and was referred to the White Plains office. On several occasions since then, he has met with Probation Officer Mark J. Maffucci at the U. S. Department of Probation at 300 Quarropas Street in White Plains, New York, with counsel, where a copy of the Judgment and Commitment papers (Exhibit D annexed hereto) and a statement of the conditions of supervised release were shown to Mr. Crea. Mr. Crea was further advised that the Department of Probation intended to be guided by all of the conditions and expected Mr. Crea to adhere to them. He acknowledged receipt

of the conditions, consented to voluntarily report to the Probation Officer, but reserved his right to protest.

12. In addition to the mandatory conditions of supervised release that he not commit another federal, state or local crime during the period of supervised release (Exhibit D at 3 n.1) and that he not possess illegal controlled substances (Exhibit D at 3 n.8), the Judgment imposed twelve other conditions, which were not imposed by the Court at defendant's sentencing and which are not included under the mandatory conditions of the Sentencing Guidelines. U.S.S.G. §5B1.4

13. Other than the requirement that Mr. Crea periodically report to the Probation Officer, each and every one of the remaining 11 conditions set forth in the annexed judgment impairs a substantial liberty interest such as Mr. Crea's fundamental rights of privacy and movement and his First Amendment right of freedom of association, his Fourth Amendment right to be free in from warrantless search and seizure and his Fifth Amendment right against self-incrimination.

14. For example, the condition which prohibits Mr. Crea from associating with any individuals who have been convicted of a felony without authorization not only burdens Mr. Crea's First Amendment right of freedom of association, but directly impacts his ability to maintain his livelihood. Mr. Crea has requested and has been denied permission to maintain contact with Mr. Vincent DiNapoli, who has a prior felony conviction on a wholly unrelated charge. For the past twenty years Messrs. Crea and DiNapoli have maintained a business relationship. Together, they own the following real estate management and development companies: VLJ Building Corporation, Martinque Building Corporation and Viele Barretto Land Corporation. VLJ was incorporated in or about 1971 and currently owns and manages twenty-two premises; Martinique was incorporation in or about 1972 and currently owns and manages six premises; and Viele Barretto was incorporated in or about 1986 and currently owns and manages three premises.

15. In order to maintain the fiscal integrity and ongoing operation of these corporations, it is imperative that Mr. Crea and Mr. NiNapoli, as principals, maintain a working relationship. Mr. Crea needs to be able to communicate with Mr. DiNapoli about matters regarding tenants, the maintenance of the premises, cost containment and general managerial matters. Additionally, VLJ presently is involved in a twenty-nine lot development project in the Bronx. The decision by Probation to impermissibly preclude any communication between Mr. DiNapoli and Mr. Crea will hinder the normal course of business activities and will have a negative impact on Mr. Crea's ability to support himself and his family.

16. Because not one of the discretionary conditions set forth in the "Conditions of Supervision" annexed to the judgment and commitment papers were imposed at sentencing, nor was any reason given at sentencing for the imposition of any discretionary conditions, the Judgment as written is an *ultra vires* document with no legal force to impose conditions of sentence, other than those conditions imposed by the Court at Sentencing on December 8, 1995.

17. Conditions 2 through 7 and conditions 9 through 14, as set forth in the Conditions of Supervision, therefore, constitute an impermissible *ex post facto* modification of defendant's sentence in violation of his due process rights and 18 U.S.C. §§3583(d); 3603 and Rules 32.1 of Federal Criminal Procedure.

18. Defendant's motion should be granted in all respects and an order be entered resettling the judgment entered on December 8, 1996 pursuant to Fed. Rules Cr. Proc. Rule 36 by deleting conditions 2 through 7 and conditions 9 through 14 of the Conditions of Supervision annexed thereto.

WHEREFORE, your deponent prays for an order grating all relief requested and set forth in the Notice of Motion and accompanying papers.

s/Paul A. Victor
PAUL A. VICOR (PV 0497)

Sworn to before me on
the 9th day of January, 1997

s/Jeanine O'Connell

JEANINE O'CONNELL
Notary Public State of New York
No. 01OC5033206
Qualified in Queens County
Commission Expires Sept. 12, 1998

Appendix H - Transcript of Oral Argument on Motion dated February 7, 1997.

(1) UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	93 CR 506
-against-	:	U. S. Courthouse Brooklyn, New York
STEVEN CREA,	:	
Defendant.	:	February 7, 1997 12:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STERLING JOHNSON, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: ZACHARY W. CARTER
United States Attorney
BY: BRIDGET ROHDE, ESQ.
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

For the Defendant: PAUL A. VICTOR, ESQ.

Court Reporter: Anthony M. Mancuso
225 Cadman Plaza East
Brooklyn, New York
(718) 330-7687

Proceedings recorded by mechanical stenography, transcript produced by CAT.

(2) (Case called; both sides ready.)

THE COURT: Where is the defendant?

MR. VICTOR: I didn't know that we were required to have the defendant here.

MS. ROHDE: It would be the government's position that the defendant should always be here, unless the court had excluded him.

THE COURT: Where is he?

MR. VICTOR: He's not here. This was a motion that we brought on. I would say I would waive his presence if it's necessary.

THE COURT: What's the motion for?

MR. VICTOR: This is a motion to resettle the judgment which your Honor entered after the oral sentence had been imposed, upon the ground that the judgment itself incorporates additional conditions not imposed when the oral sentence was imposed, in violation of the Rules and the law.

So, we're here to resettle the judgement.

MS. ROHDE: Your Honor, the government obviously opposes that. We don't believe there's any need to resettle any judgement.

THE COURT: Le'ts hear you.

MR. VICTOR: First of all, your Honor will recall, in this particular case, that the sentence ultimately imposed was the result of a plea agreement, and that was a plea agreement (3) which was negotiated over a long period of time, almost one year. Every "I" that was dotted in that agreement, every "T" that was crossed, was the result of a long, hard negotiation between the defendant and the government.

One of the conditions of that agreement, your Honor, was that the government would take no position on the sentence.

MS. ROHDE: Could I correct Mr. Victor?

MR. VICTOR: Let me finish what I have to say.

THE COURT: No. Just a second.

MR. VICTOR: I called to your Honor's attention, when the sentence was originally imposed, that they had violated their

agreement by the submission to you, and now they have violated it again. We address it in our reply brief.

They have taken a position on sentencing. It's a violation of the agreement. The cases which I quote make it abundantly clear that it is a violation of the agreement, and I'm going to ask your Honor preliminarily to expunge the submission they made in this case, and to impose sanction.s

MS. ROHDE: Can I be heard on this, your Honor?

THE COURT: You'll get an opportunity.

What else?

MR. VICTOR: On that issue, I can go into the merits, if your Honor please.

THE COURT: Go into the merits.

(4) MR. VICTOR: When your Honor imposed the sentence, your Honor imposed a sentence of nine months in jail, a dollar amount of restitution, and supervised release.

Your Honor imposed no special conditions, other than the payment of the taxes, and imposed none of the discretionary conditions which your Honor could have imposed when the sentence was imposed in the presence of the defendant.

Thereafter, after the imposition of the sentence, a judgment form was signed by your Honor. That judgment form is a printed form, and has appended to it a number of what is called in the form "Standard Conditions of Supervision." The word "standard," your Honor, is a misnomer. There are no standard conditions of supervised release.

U.S. vs. Smith make it abundantly clear - - United States vs. Smith, which we quote in our memorandum of law to your Honor - - and I'm quoting it right from the case which is in front of me - -

THE COURT: What circuit was that?

MR. VICTOR: Second Circuit.

As Smith notes, the Sentencing Reform Act eliminated standard conditions, replacing them with mandatory and discretionary conditions.

There are no standard conditions of supervised release. It's a misnomer, and that is the problem that the (5) government has here in its submission. It starts with a false premise, that it is standard, and then argues to your Honor that they should be, therefore, implied in the sentence which you imposed.

Both the Sentencing Reform Act, the United States Code section, which implements that act, and the guidelines, make it clear your Honor must impose certain conditions. And as to those conditions, we have no objection. They are a part of his sentence.

THE COURT: Are you saying this part, number five, that the defendant shall support his or her dependents and meet her family responsibilities, is discretionary on the part of the supervised release?

MR. VICTOR: That's exactly what the law says, your Honor. Discretionary. It falls into the discretionary provisions. If your Honor would look at not only the guidelines, but I will quote from the guidelines, section 5D - -

THE COURT: When did you file your brief?

MR. VICTOR: We filed our notice of motion - -

MS. ROHDE: January 10, the defense filed the original motion, and today at about 11:00, they filed their rely.

MR. VICTOR: No. We filed the reply yesterday. Your office wouldn't except - - we faxed it to you today.

(6) MS. ROHDE: I received it on my way out the door to come here.

MR. VICTOR: You have an original brief and a reply brief.

MS. ROHDE: And we responded.

THE COURT: Just a second.

Ms. Rohde, have you had a chance to respond to these?

MS. ROHDE: I responded to the motion, your Honor. In fact, he submitted a letter dated January 28. I have not responded to the reply, because, as I said, it came in at about 11:00 o'clock this morning.

THE COURT: So, nothing is going to happen today, anyway, because I have not received a reply.

MR. VICTOR: The reply was left at the clerk's office, two copies. One was for the file, and a courtesy copy was left at the clerk's office yesterday.

THE COURT: That's all well and good. I have not received it.

MR. VICTOR: Okay, your Honor. We have just handed up another copy to your clerk.

THE COURT: Let me hear from the government.

MS. ROHDE: Yes, your Honor. First of all, let me begin with this argument about the court not having imposed the standard conditions of supervised release at the time of (7) sentencing.

Actually, this is an argument that is pure semantics, in the government's view. At the time of sentencing, your Honor imposed a term of supervised release upon Mr. Crea, and it was with the judgment and conviction order that the court further explained what those - - what "supervised release" means, in effect, by the list that is plainly labeled "Standard Conditions of Privileged Release."

For Mr. Victor to say there's no such thing as standard conditions any longer is just incorrect.

If the court looks at the Sentencing Guidelines, specifically section 5B1.4A, it says: "The following standard conditions" - - 1 through 13 - - "are generally recommended for both probation and supervised release.

THE COURT: 5 (b) 1. what?

MS. ROHDE: 5B1.4A and 1 through 13 are essentially the same conditions that appear in the court's order under the label "Standard Conditions of Supervised Release."

For Mr. Victor to say that this is all a big surprise to him and to Mr. Crea simply is incredible.

When his term of supervised release was imposed upon Mr. Crea, Mr. Crea had to know that there would be some terms - - I'll allowed you to finish, Mr. Victor - - there would be some terms that he would, in fact, be supervised, that he would, in fact, have to go to a probation officer, that he (8) would have to maintain employment, etcetera.

The whole genesis of this whole thing appears to be that Mr. Crea wants to be able to do business with a convicted felon. I think, especially in light of that, the court should consider what supervised release is all about, and that is, protecting the community and rehabilitating the person who is subject to supervised release.

And I thing plainly, when the court looks at the whole picture, it's apparent that there's no variance between the judgment and the oral sentence as Mr. Victor says. And this is part and parcel of an ordinary sentence, it's imposed in this courthouse every day, and it should be imposed here, that Mr. Crea should be subject to these conditions as the court made him subject to these conditions.

Now, I do want to talk for a minute about this allegation that the government has violated the terms of the plea agreement. I take this very seriously, because Mr. Victor simply, I think, is trying to put a black mark on the government, so to speak, as we start out the case.

What the plea agreement says, very specifically, very plainly, your Honor, at page four, paragraph 5(b), is that the government will take no position concerning where, within the appropriate Sentencing Guideline range, the defendant should be sentenced.

The government can't say, oh, he should receive six, (9) or, he should receive twelve. Certainly, there's no blanket prohibition to the government doing, as its duty is, to respond to motions that are set forth by the defense.

Does the court have any specific points within these motions?

THE COURT: I'll look at these papers.

Let me ask Mr. Victor: You say that these conditions incorporated in the J&C are discretionary with the defendant?

MR. VICTOR: No, discretionary with the court.

The court had the discretion to impose them, did not impose them at the time the sentence was imposed, and therefore, they are no longer binding - - not "no longer" - - they are not binding on Mr. Crea. Only the mandatory conditions of supervised release are binding on him.

And I would like to articulate that a little further, your Honor.

THE COURT: So, you are saying that if the defendant were caught in possession of a controlled substance or selling a controlled substance - -

MR. VICTOR: That's a mandatory condition. That's a violation.

MS. ROHDE: Your Honor, if I could respond to that point?

Obviously, whether Mr. Crea were on supervised release or not, he couldn't be engaging in crimes, and he (10) couldn't be doing drugs. And for that reason, for Mr. Victor to be standing here and saying they are the only conditions that apply is really ludicrous. There has to be something else to supervised release.

THE COURT: Let me ask Mr. Victor something else: This one, "associating with any person engaged in criminal activity."

MR. VICTOR: That's a discretionary condition, your Honor.

THE COURT: And are you saying if Mr. Crea chooses to associate with a known felon or organized-crime figure, he could not be violated for supervised release?

MR. VICTOR: That's correct. Clearly - - and if I can articulate it, your Honor.

First of all, as the Second Circuit in 1992 said, the Sentencing Reform Act eliminated standard conditions, replacing them with mandatory and discretionary.

Section 3583 of the United States Code states that your Honor shall impose the mandatory conditions, and may impose the discretionary conditions.

And implementing that section, the guidelines, at D1.3 said: "If a term of supervised release is imposed, the court shall impose a condition that the defendant not commit another federal, state or local crime." Citing that section: "The court shall also impose a condition that the defendant (11) not possess illegal or controlled substances." Again, citing the United States Code, subdivision B says: "The court may impose other conditions," and then refers you to 5B1.5.

It is clear, your Honor, there's no doubt about it, the cases hold it, Smith holds it, Marquez and Sorbell, which I've cited,

hold it, that unless those conditions are imposed at the time the oral sentence is imposed in the presence of the defendant, any subsequent signed judgment - -

THE COURT: Well, nothing is going to happen today. The government has not had an opportunity to reply to your reply motion.

MS. ROHDE: That's right, your Honor.

THE COURT: When they do, then I'll make a decision.

MR. VICTOR: On the first issue, your Honor, I just really wanted to address something she said, and call your attention to our brief.

The government is taking the position that they are allowed to take a position in this proceeding because it's only on the sentence imposed that they are to take no position.

MS. ROHDE: No. On the Sentencing Guideline range.

MR. VICTOR: We make clear in our brief, and the cases make clear, that this issue and the guideline range, supervised release, are part of the sentence. They are not ancillary to it. They are an integral part of the sentence (12) itself, and the government should be taking no position.

Your Honor, I cited two cases where the circuit court has admonished the prosecution from taking positions on this type of situation after they enter into such agreements.

THE COURT: I don't have the papers. I am not going to admonish the prosecutor. That's number one.

Number two, until this case is resolved, if you really want to test whether this condition of supervised release is discretionary or standard, as you say, and you will have your client meet with an organized-crime figure and you want to test it to see whether he can be arrested or have his supervision violated, go ahead. I'll do what I have to do. I'm going to look at this, and you will get a decision.

MR. VICTOR: Thank you, your Honor.

MS. ROHDE: Thank you, your Honor.

THE COURT: You're welcome.